

## OPINION SUMMARY

### MISSOURI COURT OF APPEALS EASTERN DISTRICT

EUGENE CALVERT,	)	No. ED96073
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of Clark County
vs.	)	
	)	Honorable Gary L. Dial
SUSAN PLENGE,	)	
	)	
Appellant.	)	FILED: November 1, 2011

Appellant Susan Plenge (Plenge) appeals from the trial court's dismissal of her counterclaims against Respondent Eugene Calvert (Calvert) upon Calvert's motion for summary judgment in an underlying property dispute. The trial court held that a summary judgment affidavit Plenge submitted in opposition to Calvert's motion for summary judgment could not be considered because it contradicted her earlier deposition testimony. The trial court also held that the affidavit would not create a genuine issue of material fact, even if considered.

#### AFFIRMED

Division 5 holds: 1) The trial court erred in holding that Plenge's summary judgment affidavit could not be considered. Plenge's summary judgment affidavit was not inconsistent with her earlier testimony because it addressed a fact to which Plenge did not testify during her earlier deposition. 2) Plenge failed to appeal the trial court's holding that Calvert was entitled to summary judgment, even if the trial court considered Plenge's summary judgment affidavit, because the affidavit did not create a genuine issue of material fact that Plenge failed to assert her counterclaims against Calvert before the expiration of the statute of limitations.

Opinion by: Kurt S. Odenwald, C.J., Clifford H. Ahrens, J., and Gary M. Gaertner, Jr., J., Concur.

Attorney for Appellant: Howard M. Hickman

Attorney for Respondent: James R. Dowd and Joseph F. Yeckel

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